

STEVEN G. KALAR
Federal Public Defender
HANNI M. FAKHOURY
Assistant Federal Public Defender
1301 Clay Street, Suite 1350N
Oakland, CA 94612
(510) 637-3500
hanni_fakhoury@fd.org

Attorneys for DUMAKA HAMMOND

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,) CR 16-102-JD
v.)
Plaintiff,) DEFENDANT'S REPLY TO UNITED
DUMAKA HAMMOND,) STATES' RESPONSE TO MOTION TO
Defendant.) SUPPRESS STATEMENTS
Date: September 14, 2016
Time: 10:30 a.m.

)

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
A. The Correct Custody Factors to Consider For In-Home Interrogations Are those in <i>Craighead</i> , not <i>Bassignani</i>	2
B. Mr. Hammond Was Clearly in “Custody” and Should Have Been Advised of His <i>Miranda</i> Rights.....	4
C. Any Factual Disputes Must Be Resolved With an Evidentiary Hearing.....	10
CONCLUSION	10

TABLE OF AUTHORITIES

2	<i>Coomer v. Yukins</i> , 533 F.3d 477 (6th Cir. 2008).....	3
3	<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	<i>passim</i>
4	<i>United States v. Bassignani</i> , 575 F.3d 879 (9th Cir. 2009)	2, 3, 4
5	<i>United States v. Beraun-Panez</i> , 812 F.2d 578, as modified, 830 F.2d 127 (9th Cir. 1987)	3
6	<i>United States v. Booth</i> , 669 F.2d 1231 (9th Cir. 1981)	3
7	<i>United States v. Clymer</i> , 524 F. App'x 354 (9th Cir. 2013) (unpublished).....	4, 8
8	<i>United States v. Craighead</i> , 539 F.3d 1073 (9th Cir. 2008)	<i>passim</i>
9	<i>United States v. Crawford</i> , 372 F.3d 1048 (9th Cir. 2004) (en banc)	3
10	<i>United States v. Durazo</i> , 2014 WL 217895 (D. Ariz. Jan. 21, 2014) (Collins, D.J.)	9
11	<i>United States v. Eaton</i> , 954 F. Supp. 2d 646 (W.D. Mich. 2013) (Bell, D.J.)	3
12	<i>United States v. Gladney</i> , 2009 WL 175157 (C.D. Cal. Jan. 23, 2009) (Whaley, D.J.)	6
13	<i>United States v. Hayden</i> , 260 F.3d 1062 (9th Cir. 2001)	3
14	<i>United States v. Howard</i> , 2016 WL 97448 (N.D. Cal. Jan. 8, 2016) (Chhabria, D.J.)	9
15	<i>United States v. Kim</i> , 292 F.3d 969 (9th Cir. 2002)	3
16	<i>United States v. McKany</i> , 2016 WL 2587540 (9th Cir. May 5, 2016) (unpublished).....	3, 8
17	<i>United States v. Nguyen</i> , 2016 WL 2593893 (N.D. Cal. May 5, 2016) (Freeman, D.J.)	3
18	<i>United States v. Richardson</i> , 36 F. Supp.3d 120 (D.D.C. 2014) (Jackson, D.J.)	9
19	<i>United States v. Salabye</i> , 623 F. Supp.2d 1010 (D. Ariz. 2009) (Campbell, D.J.)	9
20	<i>United States v. Saunders</i> , 2015 WL 9269968 (N.D. Cal. Dec. 21, 2015) (Koh, D.J.)	3
21	<i>United States v. Walczak</i> , 783 F.2d 852 (9th Cir. 1986)	10
22	<i>United States v. Warras</i> , 2015 WL 6736981 (D. Nev. May 18, 2015) (Ferenbach, M.J.)	
23	<i>R. & R. adopted</i> 20105 WL 6755275 (D. Nev. Nov. 4, 2015) (Dawson, D.J.).....	9
24	<i>United States v. Wolf</i> , 472 F. App'x 548 (9th Cir. 2012) (unpublished).....	4

INTRODUCTION

In its response to Mr. Hammond’s motion to suppress, the government does not contest the most significant facts demonstrating Mr. Hammond was in “custody” and should have been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The government does not contest that seventeen law enforcement officers from four different agencies executed a search warrant at Mr. Hammond’s home in the early morning. *See Doc. 30, Defendant’s Motion to Suppress Statements, Exhibit A, July 28, 2015 FBI 302 Report of Investigation (“FBI 302”)*. It does not dispute that Mr. Hammond and his family, including his fourteen year old niece, were handcuffed and escorted to the front porch of the house. *See Doc. 30, Defendant’s Motion to Suppress Statements, Exhibit B, Declaration of Dumaka Hammond (“Hammond Dec.”) at ¶¶ 2-5*. It does not dispute that Mr. Hammond was interrogated without a shirt on. *Hammond Dec. at ¶¶ 3, 15*. The government does not challenge the fact there were firearms present when the agents executed the search warrant, and that at least two firearms were in Mr. Hammond’s small bedroom when he was interrogated by two FBI agents. *See Doc. 35-1, Declaration of Special Agent Brian E. Lester in Support of United States’ Response to Defendant’s Motion to Suppress Statements (“Lester Dec.”) at ¶ 5*. And the government makes no effort—because it cannot—to challenge Agent Basanez’s statement to Mr. Hammond that the FBI was “going to have somebody kind of hanging out with you just for our safety,” a statement that clearly meant Mr. Hammond did not have freedom of movement. *Doc. 30, Defendant’s Motion to Suppress Statements, Exhibit C, Transcript of July 17, 2015 Interrogation of Dumaka Hammond (“Transcript”) at 62*. The government concedes Mr. Hammond was “interrogated” and that no agent advised Mr. Hammond of his *Miranda* rights. *See Doc. 35, United States’ Response to Motion to Suppress Statements (“U.S. Oppo.”) at 5-6*.

The only response the government makes is that Mr. Hammond was not in “custody,” arguing that a “custodial interrogation cannot take place” when a defendant is interrogated in his bedroom in a non-aggressive way and told he is free to leave. U.S. Oppo. at 1. That is flatly incorrect: the Ninth Circuit has already found in nearly identical circumstances that a defendant interrogated in his home and told he could leave was nonetheless in “custody” for purposes of *Miranda*. See *United States v.*

Craighead, 539 F.3d 1073, 1089 (9th Cir. 2008). Rather than confront this reality, the government turns a blind eye to the controlling Ninth Circuit case which establishes the standard for assessing whether an in-home interrogation is custodial, and instead relies on Ninth Circuit cases that analyze “custody” outside of a defendant’s home. *See U.S. Oppo.* at 5 (citing *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009)); *see Bassignani*, 575 F.3d at 880 (interrogation took place in “a conference room at [defendant’s] workplace”). When this Court applies the correct standard—*Craighead*—it is clear Mr. Hammond was in “custody” and his statements must be suppressed.

ARGUMENT

A. **The Correct Custody Factors to Consider For In-Home Interrogations Are those in Craighead, not Bassignani.**

Inexplicably, the government’s opposition almost completely ignores *Craighead*, the binding Ninth Circuit case that addressed a question “of first impression” that clearly governs this case: “under what circumstances under the Fifth Amendment does an interrogation by law enforcement officers in the suspect’s own home turn the home into such a police-dominated atmosphere that the interrogation becomes custodial in nature and requires *Miranda* warnings?” 539 F.3d at 1077. Or, in simpler terms, “how to apply the traditional *Miranda* inquiry to an in-home interrogation.” *Id.* at 1083. The government does not mention, let alone discuss, the four factors *Craighead* identified as “relevant to whether the circumstances of Craighead’s interrogation effected a police-dominated atmosphere.” *Id.* at 1084. In fact, the government’s only reference to *Craighead* is its quotation—twice—of the opinion’s prefatory statement that “courts have generally been much less likely to find that an interrogation in the suspect’s home was custodial in nature.” See U.S. Oppo. at 6; see also *id.* at 6-7 (citing *Craighead* for proposition that the fact interrogation took place in Mr. Hammond’s home “weighs in factor of a determination that the interview was non-custodial in nature.”).

But the whole point of *Craighead* was to confront the “analytical challenges” with applying *Miranda* safeguards during an interrogation that takes place at a suspect’s home and to provide a framework for courts to use in assessing whether an in-home interrogation is custodial. *Craighead*, 539 F.3d at 1083. The government offers no explanation or justification for rejecting the factors

1 *Craighead* concluded were uniquely suited for analyzing in-home interrogations.

2 Instead, the government relies on the “five factors relevant to the custody determination”
 3 identified by the Ninth Circuit in *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009). *See U.S.*
 4 *Oppo.* at 5-10. But the interrogation in *Bassignani* took place “in a conference room at [the
 5 defendant’s] workplace,” not in his home. 575 F.3d at 880.¹ The five-factor test in *Bassignani* came
 6 from other cases where the interrogation also took place somewhere other than the defendant’s home.
 7 *See United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002) (interrogation at defendant’s store);
 8 *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001) (interrogation in FBI building); *United*
 9 *States v. Beraun-Panex*, 812 F.2d 578, 580 (9th Cir. 1987) (interrogation in remote, rural area), *as*
 10 *modified*, 830 F.2d 127 (9th Cir. 1987). The other Ninth Circuit cases relied on by the government
 11 in its response suffer from the same flaw. *See U.S. Oppo.* at 9-10 (citing *United States v. Crawford*,
 12 372 F.3d 1048, 1051-52 (9th Cir. 2004) (en banc) (interrogation took place in FBI office); *United*
 13 *States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981) (questioning during *Terry* stop on public
 14 street)).² In other words, the government relies on the “usual inquiry” that *Craighead* found
 15 insufficient to “capture the uniqueness of an interrogation conducted within the suspect’s home.”
 16 539 F.3d at 1082.

17 The Ninth Circuit has looked *exclusively* to the *Craighead* factors when considering whether
 18 an in-home interrogation is “custodial” under *Miranda*. *See, e.g., United States v. McKany*, 2016
 19 WL 2587540, *1 (9th Cir. May 5, 2016) (unpublished) (reversing denial of suppression motion and
 20 finding interrogation custodial based on *Craighead* factors alone); *United States v. Clymer*, 524 F.
 21

22 ¹ The government also relies on a Sixth Circuit decision in a habeas case, which upheld the
 23 reasonableness of state court decisions finding the petitioner’s in-home interrogation was not
 24 custodial. *U.S. Oppo.* at 6 (citing *Coomer v. Yukins*, 533 F.3d 477, 487 (6th Cir. 2008)). But the
 25 Sixth Circuit’s approach to analyzing in-home interrogations is different than the Ninth Circuit’s
 26 approach in *Craighead*. *See United States v. Eaton*, 954 F. Supp. 2d 646, 650-51 & n.3 (W.D. Mich.
 27 2013) (Bell, D.J.) (relying on factors from prior Sixth Circuit cases to hold that in-home interrogation
 28 was not custodial and rejecting defendant’s suggestion to consider *Craighead*: “the Court declines
 to follow a Ninth Circuit decision which contradicts an on-point, binding Sixth Circuit precedent.”).

2 ² The district court decisions relied on by the government are also not on point. *United States v. Nguyen*, 2016 WL 2593893 (N.D. Cal. May 5, 2016) (Freeman, D.J.) involved an interrogation of a
 priest at his church. *United States v. Saunders*, 2015 WL 9269968 (N.D. Cal. Dec. 21, 2015) (Koh,
 D.J.) involved an interrogation inside an FBI agent’s car.

1 App'x 354, 355 (9th Cir. 2013) (unpublished) (using *Craighead* factors alone to evaluate “whether
 2 an interrogation occurring within a suspect’s residence is custodial” and suppressing statements);
 3 *United States v. Wolf*, 472 F. App’x. 548, 549 (9th Cir. 2012) (unpublished) (citing only *Craighead*
 4 factors in “evaluating” whether defendant was in “‘in custody’ when interview in her home”).

5 This Court should follow these Ninth Circuit decisions and use *Craighead*, not *Bassignani*,
 6 to evaluate whether Mr. Hammond was in custody.

7 **B. Mr. Hammond Was Clearly in “Custody” and Should Have Been Advised of His**
Miranda Rights.

9 Under *Craighead*, this Court must consider four factors to determine whether an interrogation
 10 that took place inside the home is “custodial” and must be preceded by *Miranda* warnings: “(1) the
 11 number of law enforcement personnel and whether they are armed; (2) whether the suspect was at
 12 any point restrained by physical force or by threats; (3) whether the suspect was isolated from others;
 13 and (4) whether the suspect was informed that he was free to leave or terminate the interview, and
 14 the context in which those statements were made.” 539 F.3d at 1084. As set forth in Mr. Hammond’s
 15 motion to suppress, he clearly was in “custody” under these factors.

16 *Craighead* noted “the presence of a large number of visibly armed law enforcement officers
 17 goes a long way towards making the suspect’s home a police-dominated atmosphere.” 539 F.3d at
 18 1085. Here, the number of officers doubled that in *Craighead*. There were seventeen law
 19 enforcement officers from four different agencies, most of whom were visibly armed, that conducted
 20 the search of Mr. Hammond’s residence. *See* FBI 302.

21 The government does not dispute there were seventeen officers in Mr. Hammond’s small
 22 home but argues that Mr. Hammond’s declaration suggests “he only saw ‘at least six law enforcement
 23 officers in the doorway entering the apartment’” and “does not otherwise state, suggest or allude to
 24 Hammond being aware of the fact that there were 17 officers.” U.S. Oppo. at 8 (quoting Hammond
 25 Dec. at ¶ 4). The government misreads Mr. Hammond’s declaration, which indicates that he saw “at
 26 least” six officers, meaning he knew there were more but unsure of how many specifically.
 27 Moreover, whether Mr. Hammond knew there were six officers or seventeen is beside the point;

1 custodial determinations for *Miranda* are objective. *See Craighead*, 539 F.3d at 1082 (custody
 2 determination requires asking “whether a reasonable person in those circumstances would ‘have felt
 3 he or she was not at liberty to terminate the interrogation and leave.’”) (quoting *Thompson v.
 4 Keohane*, 516 U.S. 99, 112 (1995)). The undisputed fact that there were seventeen officers in Mr.
 5 Hammond’s small home means it was objectively a “police-dominated atmosphere” that shows Mr.
 6 Hammond was in “custody.” *Craighead*, 539 F.3d at 1085.³ After all, in *Craighead* the Ninth Circuit
 7 found the presence of eight officers—half as many as were in Mr. Hammond’s apartment—
 8 objectively turned Craighead’s home into a “police dominated atmosphere” which meant the
 9 defendant was in custody. *Id.*

10 Regarding restraint, the government argues that “[c]ontrary to Mr. Hammond’s statements,
 11 he was not handcuffed at any point during the interview.” U.S. Oppo. at 9 (citing Lester Dec. at ¶
 12 7). But of course, Mr. Hammond never claimed he was handcuffed during the interview; his
 13 declaration clearly states the officers handcuffed Mr. Hammond when they first entered the
 14 apartment and took them off “a few minutes after they brought me into my bedroom” and before the
 15 interrogation began. Hammond Dec. at ¶¶ 7-9. More importantly, the government does not
 16 dispute—and confirms—that Mr. Hammond was handcuffed during the search. *See* Lester Dec. at
 17 ¶ 7 (“Also prior to the interview, we removed the handcuffs from Mr. Hammond, as would be our
 18 practice unless we had a particular security concern.”). As the Ninth Circuit explained in *Craighead*,
 19 all that matters is “whether the suspect was *at any point* restrained, either by physical force or
 20 threats.” *Craighead*, 539 F.3d at 1085 (emphasis added). In fact, the Ninth Circuit found Craighead
 21 was in “custody” even though the FBI “did not handcuff Craighead *at any point* while escorting him
 22 to the storage room nor during the interview that followed.” *Id.* at 1078 (emphasis added).

23 But more important than whether Mr. Hammond was handcuffed during the interrogation is
 24 whether Mr. Hammond’s “freedom of action was restrained in a way that increased the likelihood”
 25 that he would “succumb to police pressure to incriminate himself.” *Id.* at 1086. *Craighead* explained

26 ³ The government’s complaint about Mr. Hammond’s subjective understanding about the number of
 27 officers in the apartment is inconsistent with its position later on in its opposition that “Hammond’s
 28 subjective statements about how he restrained felt [sic] are irrelevant to the court’s analysis.” U.S.
 Oppo. at 10.

1 “[r]estraint amounting to custody may also be inferred where law enforcement officers permit the
 2 suspect to move around the house for brief periods but insist on escorting and monitoring him at all
 3 times.” *Id.* at 1085; *see also United States v. Gladney*, 2009 WL 175157, *7, (C.D. Cal. Jan. 23,
 4 2009) (Whaley, D.J.) (defendant in custody at home even after handcuffs removed because “two FBI
 5 agents were guarding him at all times during the questioning”).

6 The government never addresses, let alone challenges, the fact that Agent Basanez told Mr.
 7 Hammond he would be supervised at all times during the search. The government asserts Mr.
 8 Hammond “asked the agents if they wanted to walk with him” to his car to retrieve a plastic smoking
 9 device. U.S. Oppo. at 8. But this was not Mr. Hammond volunteering to have the agents accompany
 10 him outside. He could only go outside if the agents were with him because Agent Basanez told Mr.
 11 Hammond before they went outside that “[w]e’re just going to have somebody kind of hanging out
 12 with you just for our safety.” Transcript at 62. And it is clear that Agent Basanez was going to
 13 search Mr. Hammond’s car for electronic storage devices, and he explained before they left the
 14 bedroom that once Mr. Hammond put a shirt on, “we’ll go around the side and you can show me
 15 your car.” Transcript at 56.⁴ Thus, if he wanted to go outside, Mr. Hammond had no choice but to
 16 have the agents with him. The government’s response is conspicuously silent about Mr. Hammond’s
 17 assertion that once he did sit outside to smoke, an agent stood at the bottom of the porch steps,
 18 blocking the gate to exit the apartment building. Hammond Dec. at ¶ 17; *see* U.S. Oppo. at 8 (“Mr.
 19 Hammond was told that he was free to leave the house, enter his car and leave, go to a local store, or
 20 take a smoke, as he in fact did towards the end of the recorded interview.”) (emphasis added).

21 Moreover, the government does not seriously challenge the fact that during the actual
 22 interrogation, Mr. Hammond was cornered in a room with at least two armed FBI agents.⁵ The

23 ⁴ Although the Richmond warrant did not authorize the search of Mr. Hammond’s car specifically,
 24 it did authorize the search of any computer “storage medium,” such as flash memory or USB drives,
 25 found in either the Richmond apartment or “any appurtenances to the real property” like a garage or
 driveway. At Mr. Hammond’s car, Agent Basanez asked Mr. Hammond for his USB drives in order
 to search them. *See* Transcript at 64 (“Do you mind if we check those thumb drives?”).

26 ⁵ Mr. Hammond believed there were three total agents in the room during the interrogation, while
 27 Agent Lester claims there was only two agents. *Compare* Hammond Dec. at ¶ 11 (“Agent Basanez
 28 sat on the bed next to me for the interview. There were two other agents in the room, standing against
 the wall that had the door on it.”) *with* Lester Dec. at ¶ 3 (“Only two law enforcement officers
 participated in the interview of Mr. Hammond, SA Robert Basanez, as noted in the transcript, and

1 government claims Mr. Hammond was unaware that Agent Basanez was armed, but his declaration
 2 makes clear he could see multiple firearms. *Compare* U.S. Oppo. at 9 (“Though law enforcement
 3 officers were predominantly armed, as would be expected in executing a search warrant, it appears
 4 Hammond was generally unaware of this fact.”) *with* Hammond Dec. at ¶ 11 (“There were two other
 5 agents in the room, standing against the wall that had the door on it. I could see that *these agents*
 6 were armed and had guns in their holsters.”) (emphasis added). The government suggests the fact
 7 that Agent Lester’s firearm was concealed behind his clothing makes it less intimidating. U.S. Oppo.
 8 at 9. But a firearm concealed by clothing is as visible, functional, accessible and intimidating as a
 9 firearm not concealed by clothing; otherwise there would be no point in carrying it in the first place.

10 Rather than challenge Mr. Hammond’s assertion that Agent Lester was blocking his exit from
 11 the bedroom, Agent Lester’s declaration only confirms how cornered Mr. Hammond felt. *See*
 12 Hammond Dec. at ¶ 11 (other agent “standing against the wall that had the door on it” and “[i]f I
 13 wanted to get up and leave, they would have needed to move out of the way so I could open the
 14 door.”). Agent Lester explained that he “was initially standing against the wall of the bedroom with
 15 the door on it...approximately two to three feet to the right of the door.” Lester Dec. at ¶ 4. Since
 16 Mr. Hammond’s “bedroom was small,” that resulted in Agent Lester being perhaps “less than five
 17 feet away from [Mr. Hammond] when standing up against the wall.” *Id.* Eventually, Agent Lester
 18 sat down in a chair closer to Agent Basanez and Mr. Hammond. *Id.* Thus, given the small size of
 19 the bedroom, Agent Lester would have needed to move out of the way if Mr. Hammond wanted to
 20 leave the room, even if Agent Lester was not standing directly in front of the door.

21 The third *Craighead* factor, isolation, supports Mr. Hammond, who was isolated from his
 22 family members in his bedroom during the interrogation. The government’s only response is to
 23 argue that “Mr. Hammond chose to be interviewed in the privacy of his bedroom.” U.S. Oppo. at 7.
 24 But *Miranda* itself noted that “the principal psychological factor contributing to a successful
 25 interrogation is *privacy*.” *Miranda*, 384 U.S. at 449 (emphasis added). Thus, isolation is “one of the

26 myself.”). But Agent Lester acknowledges “[i]t is possible that a third officer may have entered the
 27 room during any break in the interview.” Lester Dec. at ¶ 3. And even if Mr. Hammond was wrong
 28 and there were only two agents, the presence of two armed FBI agents, one of whom was standing
 next to the door, was a restraint on Mr. Hammond’s movement.

1 distinguishing features of a custodial interrogation.” *Craighead*, 539 F.3d at 1086-87 (citing
 2 *Miranda*, 384 U.S. at 445-46). The government’s argument that having the interrogation take place
 3 in Mr. Hammond’s bedroom as a concession to him exemplifies the problem with applying the
 4 *Bassignani* factors to an in-home interrogation. A “reasonable person interrogated inside his own
 5 home may have a different understanding of whether he is truly free ‘to terminate the interrogation’
 6 if his home is crawling with law enforcement agents conducting a warrant-approved search. He may
 7 not feel that he can successfully terminate the interrogation if he knows that he cannot empty his
 8 home of his interrogators until they have completed their search.” *Craighead*, 539 F.3d at 1083.

9 The final *Craighead* factor is the one the government spends the most amount of time
 10 discussing. It stresses that Mr. Hammond was repeatedly told he did not have to answer questions
 11 and was free to leave and that “this case should not be an outlier where a defendant is found to be in
 12 custody nonetheless.” U.S. Oppo. at 5. But finding a defendant in custody although told he did not
 13 have to answer questions and was free to leave is the exact conclusion the Ninth Circuit reached in
 14 *Craighead*. The court explained, the “mere recitation of the statement that the suspect is free to leave
 15 or terminate the interview, however, does not render an interrogation non-custodial *per se*.”
 16 *Craighead*, 539 F.3d at 1088. Nor is *Craighead* an “outlier” decision; numerous courts have
 17 suppressed in home interrogations where the defendant was repeatedly advised he was free to leave.
 18 See, e.g., *United States v. Mittel-Carey*, 493 F.3d 36, 38 (1st Cir. 2007) (defendant in custody at
 19 home although agents told him “he did not have to respond to the agents’ questions” and did not
 20 arrest him after completing search); *McKany*, 2016 WL 2587540, at *1 (defendant in custody at
 21 home although “officers informed McKany that he was free to leave or terminate the interview”);
 22 *Clymer*, 524 F. App’x at 355-56 (defendant in custody at home although “Clymer was told that he
 23 was not under arrest and was free to leave”).

24 Rather than look at how many times the agents told Mr. Hammond he could leave, the Court
 25 must instead consider the “delivery of these statements within the context of the scene as a whole.”
 26 *Craighead*, 539 F.3d at 1088. *Miranda* is not concerned with “whether the suspect was *told* that he
 27 was free to leave” but whether “a reasonable person [would] have *felt* he or she was not at liberty to

1 terminate the interrogation and leave.” *Id.* (quoting *Thompson*, 516 U.S. at 112) (quotations omitted).

2 Notwithstanding how many times the agents *told* Mr. Hammond he was not under arrest and
 3 free to leave, he objectively did not *feel* free to leave.⁶ The overwhelming presence of the officers
 4 and the FBI’s request that Mr. Hammond be escorted throughout the apartment meant Mr. Hammond
 5 was deprived of “police-free rooms or spaces” where he could retreat during the search. *Craighead*,
 6 539 F.3d at 1084. The next logical place for Mr. Hammond to go—work—was unavailable because
 7 the FBI had seized his computer, which he needed for his job. *Id.* at ¶ 14. The agents even advised
 8 him to call in sick, encouraging him from going to one possible refuge from the FBI. *Id.*

9 The FBI’s decision to repeatedly tell Mr. Hammond he was free to leave seems predicated
 10 “on the theory that these magic words would allow officers to keep questioning suspects without
 11 advising them of their *Miranda* rights, even if it is otherwise obvious that the suspects are in custody
 12 and therefore entitled to *Miranda*’s protective admonitions.” *United States v. Howard*, ___ F.
 13 Supp.3d ___, 2016 WL 97448, *5 (N.D. Cal. Jan. 8, 2016) (Chhabria, D.J.) (citations omitted)). As
 14 one district court explained in granting a motion to suppress an in-home custodial interrogation,
 15 “[j]ust because agents repeatedly used the magic words ‘you are not under arrest’ and ‘you are free
 16 to leave’ [does] not make [a] gathering non-custodial.” *United States v. Durazo*, 2014 WL 217895,
 17 *9 (D. Ariz. Jan. 21, 2014) (Collins, D.J.).

18 In short, considering all of the *Craighead* factors, Mr. Hammond was in “custody” and should
 19 have been advised of his *Miranda* rights prior to any interrogation by the FBI.

20
 21
 22 ⁶ The government seizes Mr. Hammond’s acknowledgement that the agents questioned Mr.
 23 Hammond in a professional tone and were not aggressive with him to argue that he was not in
 24 custody. *See U.S. Oppo.* at 6. But as explained in Mr. Hammond’s motion to suppress, “[h]owever
 25 calm in demeanor and normal in tone, the officers were ever present” and that is enough to find a
 26 person is in custody for purposes of *Miranda* if the home has become a police dominated atmosphere
 27 under the *Craighead* factors. *United States v. Richardson*, 36 F. Supp.3d 120, 129 (D.D.C. 2014)
 28 (Jackson, D.J.); *see also United States v. Salabye*, 623 F. Supp.2d 1010, 1013-14 (D. Ariz. 2009)
 (Campbell, D.J.) (while agent was “calm and courteous, [he] was clearly in control of the situation”
 and defendant therefore in custody); *United States v. Warras*, 2015 WL 6736981, *13 (D. Nev. May
 18, 2015) (Ferenbach, M.J.) (“The mere fact that Mr. Warras showed the agents memorabilia or
 made jokes is insufficient to conclude that his home was not police dominated.”), *R. & R. adopted*
 20105 WL 6755275 (D. Nev. Nov. 4, 2015) (Dawson, D.J.).

C. Any Factual Disputes Must Be Resolved With an Evidentiary Hearing.

The majority of the facts are not in dispute and Mr. Hammond maintains that taking the uncontested facts from the declarations of Mr. Hammond and Special Agent Lester sufficiently demonstrates that he was in “custody.” But if the Court believes any factual dispute need be resolved in order to rule on the motion to suppress, it should hold an evidentiary hearing to resolve the conflict.

See generally United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986) (evidentiary hearing “required” if “moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in issue.”).

CONCLUSION

For the reasons stated above and in Mr. Hammond’s motion to suppress, he was in “custody” when interrogated by the FBI on July 17, 2015. Since the agents did not advise Mr. Hammond of his *Miranda* rights, any verbal or written statement given by Mr. Hammond must be suppressed.

DATED: August 25, 2016

STEVEN G. KALAR
Federal Public Defender

/S/
HANNI M. FAKHOURY
Assistant Federal Public Defender